No. 12271

In The United States Court of Appeals

For the Ninth Circuit

LEWIS FRED PENWELL and SUSANNAH W. PENWELL, Executor and Executrix of the Estate of Lewis Penwell, formerly Collector of Internal Revenue for the District of Montana, deceased, Appellants

v.

JOHN N. NEWLAND, JAMES TULLIS, GEORGE I. MARTIN, and BUTTE EXECUTIVES CLUB, a non-profit unincorporated association, Appellees

On Appeal from the United States District Court for the District of Montana

Brief for the Appellants

THERON LAMAR CAUDLE,
Assistant Attorney General.

ELLIS N. SLACK,
A. F. PRESCOTT,
GEORGE D. WEBSTER,
Special Assistants to the Attorney General.

JOHN B. TANSIL,
United States Attorney.

HARLOW PEASE,
EMMETT C. ANGLAND,
Assistant United States Attorneys.

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CITATIONS

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BRIEF FOR THE APPELLANTS

OPINION BELOW

The opinion of the District Court (R. 33-35) is not reported.

JURISDICTION

This appeal involves federal admission taxes. The taxes in dispute were paid on October 28, 1945. (R. 4-5.) Claim for refund was filed on December 5, 1945 (R. 8-9), and was rejected by notice dated February 26, 1946 (R. 28-30). Within the time provided in Section 3772 of the Internal Revenue Code and on December 31, 1946, the taxpayer brought an action in the United States District Court of Montana for recovery of taxes paid. R. 2-7. Jurisdiction was conferred on the Distirct Court by 28 U.S.C., Sec. 1340. The judgment was entered on February 7, 1949. (R. 37-39.) Notice of appeal was filed April 6, 1949 (R. 39-40), pursuant to the provisions of 28 U.S.C., Sec. 1291.

QUESTIONS PRESENTED

1. Whether amounts collected as dues and initiation fees by the Butte Executives Club and which are used almost exclusively by the club to pay for lectures to which only members and their guests are admitted, are subject to the imposition of admission taxes, under Section 1700 (a) of the Internal Revenue Code.

2. Whether the Butte Excuetives Club was entitled to maintain the suit, not having submitted a

list of the members, power of attorney authorizing the club to act as agent, and a copy of the by-laws and constitution of the club, as required by Section 101.42 of Treasury Regulations 43.

3. Whether the individuals, Newland, Tullis and Martin, are entitled to maintain this action on behalf of the Butte Executives Club.

STATUTE AND REGULATIONS INVOLVED

These are set forth in the Appendix, **infra.**

STATEMENT

The facts as found by the District Court (R. 35-36) and as stipulated by the parties (R. 14-30) may be summarized as follows:

The Butte Executives Club was organized as a non-profit, unincorporated organization in July, 1944 (R. 15), as an affiliated member of the Associated Executives Clubs, Inc., of Delaware (R. 19, Ex. A; R. 23, Ex. B).

During the month of September, 1945, the club consisted of 163 members. The members were required to pay an initiation fee of $10 upon entering or joining the club and annul dues of $10 per year. During the month in question, September, 1945, a

total of $1,910 was collected from club members, consisting of $280 as initiation fees from 28 new members, and $1,630 as annual dues from its 163 members. (R. 17.)

The Butte Executives Club is affiliated with the Associated Executives Club, Inc., which is chartered under the laws of the State of Delaware. The purpose of this latter organization is the production of education and entertainment talent through its activities as a booking agency, and the promotion and organization of local Executives Clubs in cities throughout the United States, as an outlet for such talent booked by them. (R. 16.)

The Associated Executives Club, Inc., receives all monies collected as dues and as initiation fees, except for the amount of $1 per member collected by each local club during and until the end of the first fiscal year of the local club, the latter club receiving in return therefor guest speakers during the first fiscal year, membership cards and other organizational work. After the first year the working agreement provides that all monies collected as dues and as initiation fees are to be retained by the local, in this case, the Butte Executives Club, and are to be used in payment of speakers, to be secured solely through

the parent or Associated Executives Club, Inc. (R. 16.)

Admission to the lectures is by membership card only, and is restricted to members and qualified guests, as provided in the by-laws of the Butte Executives Club. The only benefit derived by the members and the only thing of value received in return for a $10 initiation fee and annual dues of $10 is the privilege of attending the lectures scheduled by the Butte Executives Club and the privilege of taking guests. (R. 17.)

On October 28, 1945, the sum of $382 was levied and collected as admission taxes on the aggregate amount of $1,910, collected by the Butte Executives Club from its members for its fiscal year, July 1, 1945, to July 1, 1946 (R. 18), which amount was denominated by it as dues in the amount of $1,630, and initiation fees in the amount of $280 (R. 12).

The Butte Executives Club thereafter filed a claim for refund in the amount of $382 (R. 7, 18), and this claim was subsequently rejected by the Commissioner of Internal Revenue February 26, 1946 (R. 28).

The Butte Executives Club brought suit for refund and was given judgment in the District Court. (R. 37-39.)

STATEMENT OF POINTS TO BE URGED

1. The court erred in holding that the initiation fee of $10 and the dues of $10 collected from each member of the Butte Executives Club were not charges for admission to any place as that term is used in Section 1700 (a) (1) of the Internal Revenue Code.

2. The claim for refund by the Butte Executives Club was not accompanied by powers of attorney executed by each member authorizing the club to act as his agent. The individuals, Newland, Tullis, and Martin, are not entitled to maintain this action on behalf of the Butte Executives Club since they did not file a claim for refund and since they cannot bring themselves within Rule 23 (a) of the Federal Rules of Civil Procedure.

SUMMARY OF ARGUMENT

1. The admissions tax should have been imposed on the dues and initiation fees in this case since the primary benefit obtained by this payment was the privilege of admission to a series of lectures. The means devised to avoid this tax have been varied. To subject this charge to the admissions tax would follow the judicial and administrative trend of defeating these means. Further, the fees of the Butte

Executives Club clearly come within the scope of admission charges rather than that of dues and initiation fees.

2. The Treasury Regulations provide that powers of attorney must be filed authorizing the club to act as agent. This was not done; hence, since the regulation is reasonable and is deemed to have Congressional approval, the club cannot prevail. Similarly, the individual members cannot prevail on behalf of the club, since they did not file claims for refund and cannot bring themselves within the provisions of Rule 23 (a) of the Federal Rules of Civil Procedure.

I.

ARGUMENT

The District Court erred in holding that the initiation fee of $10 and the dues of $10 collected from each member of the Butte Executives Club were not charges "for admission to any place."

The admissions tax is precisely what it purports to be, i.e., a tax on an admission charge "to any place," as that term is defined in Section 101.3 of Regulations 43 (Appendix, infra).

Admission charges masquerading under another name have been gradually ferreted out and subjected

to the tax of Section 1700 (a) (1) of the Internal Revenue Code (Appendix, **infra**). A toll charge on a private road leading to a resort was judged to be levied actually for the privilege of using the amusement and not for the use of the road. **Chimney Rock Co.** v. **United States,** 63 C. Cls. 660, certiorari denied, 275 U.S. 552. A student activities fee, after some earlier equivocation, has been held to be a proper base for this tax. Min. 5834, 1945 Cum. Bull. 446. A season ticket is a proper subject for the admissions tax. M.T. 6, 1942—2 Cum. Bull. 245. Clubs having additional dues for the use of extra facilities are subject to the tax on those dues. S.T. 859, 1937—1 Cum. Bull. 334; **Exmoor Country Club** v. **United States,** 119 F. 2d 961 (C.A. 7th). A so-called political contribution was held to be a facade for an admissions charge when the size of the contribution was determinative of the kind of seat obtained. S.M. 2853, IV —1 Cum. Bull. 294 (1925). In **Twin Falls Natatorium** v. **United States,** 22 F. 2d 307 (S.D. Ohio), and **United States** v. **Koller,** 287 Fed. 418 (W.D. Wash.), admission taxes were sustained on charges to patrons of swimming pools and skating rinks, the taxpayer mistakenly alleging that this was a rental and not an admissions charge.

There are still myriad ways in which the admissions tax is being avoided by the process of putting it under a different rubric. Lent, The Admissions Tax, 1 National Tax Journal 31-50 (1948).

It is strongly urged that just such a situation is presented in the case at bar, and that what we have here is an admissions charge erroneously denominated as dues or as initiation fees.

Three stipulated facts illustrate persuasively the reality of this contention. Admission to the lectures is by membership card only and is restricted to members and qualified guests; the only thing of value received in return for the payment of the initiation fee and annual dues is the privilege of attending the scheduled lectures; and additional payment is always made for food and other services furnished at the lectures.

In addition, it should be noted that the usual concomitant features of a club are non-existent—no clubhouse, no athletic facilities, no charitable venture for the organization, no social privileges—in short, the privilege afforded the members of this club is primarily the right of admission to the series of lectures. The so-called membership fee of $10 is collected merely for the purpose of paying for the

lectures. Hence, it necessarily follows that such a fee is an amount paid for admission by season ticket or subscription and is subject to the tax imposed by Section 1700 (a) of the Internal Revenue Code.

If the lectures had been given separately without the existence of the club, then Section 1700 (a) would clearly apply. It is the position of the appellants that something substantially similar occurred, and that the mere existence of a "front", i.e., the Butte Executives Club, should not mislead the court as to the actualities of the situation. In federal tax law, the courts have been particularly adept in looking through form to the substance of a transaction.

Inserting these charges into the category of dues or initiation fees seem obviously wrong. The concept of dues is well stated in **White** v. **Winchester Club**, 315 U. S. 32, 41:

> * * * payment for the right to repeated and general use of a common club facility for an appreciable period of time has that element and amounts to a "due or membership fee" if the payment is not fixed by each occasion of actual use".

As the benefits received consisted of seven lectures a year, then this clearly comes within the category of a season ticket (M.T. 6, 1942-2 Cum. Bull. 245) rather than that of dues and initiation fees.

Further, the District Court's statement concerning the educational exclusion under Section 1710 of the Internal Revenue Code is erroneous and irrelevant. The educational exemption of Section 1700 was repealed in 1941. The query here relates to taxability under Section 1700; there is no question involved of taxation under 1710.

The District Court was in error in treating this charge as coming within the purview of the sixth paragraph of Article 101.2 of Regulations 43 (Appendix, **infra**). This paragraph stipulates that where a person or organization acquires the sole right to use any place or the right to dispose of all the admissions to any place for one or more occasions, the amount paid for such right is not subject to the tax on admissions. It also provides, however, that if the person or organization in turn sells admissions to the place the tax will apply to amounts paid for such admissions.

Alternatively, it seems evident that even if paragraph six is applicable, the tax still applies because

the club, though it secures lecturers and dining rooms, charges members for admittance.

However, paragraph five of Article 101.2 of Regulations 43 seems to be the more fitting of categories here. It provides that where the chief or sole privilege—

> of a so-called membership is a right of admission to certain particular performances or to some place on a definite number of occasions (as contrasted with a more or less unlimited right to enter a clubhouse or other place as many times as desired during a year or some other period),

then the amount paid for such so-called membership is an amount paid for admission.

A reading together of these two paragraphs argues persuasively for the appellants' position and places the fees of the Butte Executives Club squarely within Section 1700 (a) of the Internal Revenue Code.

II.

The Distruct Court erred in permitting the Butte Executives Club to prevail as party plaintiff

Section 101.42 of Regulations 43 (Appendix, infra)

provides that where a club as agent of its members seeks a refund, the claim must be accompanied by the following: A list of names of the members, powers of attorney from these members, and a copy of the constitution and by-laws of the club. This prescribed form was not followed by the appellees in this case; hence, they cannot recover. The clear intent of the club to act as agent for its members should be noted in the conclusion to the complaint (R. 6):

> Plaintiffs pray that they be permitted to maintain this action for and on behalf of all of the members of the Butte Executives Club * * *.

In **Builders' Club of Chicago** v. **United States,** 14 F. Supp. 1020, 1022, the Court of Claims held this regulation invalid, stating:

> A departmental regulation which treats the club merely as an agent of its members and requires that the individual club members each file claim for refund for the taxes paid by the club or give to the club duly executed powers of attorney to act as their agent is obviously legislation in the

guise of a regulation and therefore invalid.

The Court of Claims would probably not now conform to its former view of the law. See **Engineer's Club of Philadelphia** v. **United States,** 42 F. Supp. 182, 188, and concurring opinion by Judge Whitaker, certiorari denied, 316 U. S. 700.

In **Turks Head Club** v. **Broderick,** 166 F. 2d 877 (C.A. 1st), the court upheld these Regulations requiring the filing of powers of attorney. The touchstone for the court's decision was the fact that the tax was upon the members and not upon the club.

This is a sound distinction and is exactly the one made between the taxes imposed under Section 1700 (a) and (e) of the Internal Revenue Code. In the latter case, it (the cabaret tax) is imposed on the person receiving payment and that person is given the right to sue. In **123 East Fifty-Fourth Street** v. **United States,** 157 F. 2d 68 (C.A. 2d), even though the claimant restaurant had not refunded the cabaret tax to the customers, it could recover because the restaurant owner was designated as the taxpaper by the taxing statute. In Section 1700 (a), it (the admissions tax) is imposed on the person paying for the admission and only he can sue. Illus-

trative of this principle is **Twentieth Century Sporting Club** v. **United States,** 34 F. Supp. 1021 (Cls.), where the corporation was not allowed to recover alleged overpayments because the taxing statute had named the person paying for admission as the legal taxpayer.

In the instant case, the tax is imposed on the members and only they are entitled to recover directly or by giving power of attorney and thus recovering indirectly.

The obvious purpose of this provision is to protect the Government from liability to the legally designated taxpayers, the members of the club, after a refund has been claimed by and possibly paid to the club. For purpose of administration, an arbitrary rule of this nature must exist **regardless of who pays the tax.**

Further, the provision of the Regulations requiring powers of attorney by members has appeared in every revision of the Regulations since 1926.

The law is well settled, as stated in **Helvering** v. **Winmill,** 305 U. S. 79, 83:

> Treasury regulations and interpretations long continued without substantial change, applying

> to unamended or substantially reenacted statutes are deemed to have received congressional approval and have the effect of law.

To the same effect, see **Helvering** v. **Reynolds Co.**, 306 U. S. 110; and Brown, Regulations, Reenactment, and the Revenue Acts, 54 Harv. L. Rev. 377 (1941).

Palpably, then, since the powers of attorney were not filed, the Butte Executives Club cannot prevail in this action.

The judgment of the District Court was in favor of the appellee club and not in favors of the individuals, Newland, Tullis and Martin. Therefore, the query relative to the recovery of these individuals is not in question here as it was in the court below.

Nevertheless, these individuals cannot recover on behalf of the Butte Executives Club for precisely the same reason they cannot recover themselves, i.e., they have not filed claims for refund, a condition precedent to the institution of suit under Section 3772 of the Internal Revenue Code. The administrative remedy must be exhausted before resort can be had to the courts.

In addition, there is no submission that the club

authorized these three members to maintain and prosecute the suit for it.

Further, these individuals cannot maintain this action under Rule 23 of the Federal Rules of Civil Procedure as a class action. Necessity is the **raison d'etre** of the class suit doctrine. Since the owner of the primary right, the Butte Executives Club, does have the right to prosecute this suit if the proper procedure is used, it follows that these individuals are precluded from maintaining the suit on behalf of the members of the club.

As far as clause 2 of Rule 23 is concerned, there is no allegation that these individuals have any right to or interest in the subject matter of the suit.

The action cannot be brought under clause 3 since there does not exist a question common to the individuals and the club.

CONCLUSION

We therefore submit that the judgment of the District Court should be reversed.

Respectfully submitted,

THERON LAMAR CAUDLE,
Assistant Attorney General.

ELLIS N. SLACK,
A. F. PRESCOTT,
GEORGE D. WEBSTER,
Special Assistants to the
Attorney General.

JOHN B. TANSIL,
United States Attorney.

HARLOW PEASE,
EMMETT C. ANGLAND,
Assistant United States Attorneys.

September, 1949.

APPENDIX

Internal Revenue Code:

SEC. 17 (as amended by Sec. 541, Revenue Act of 1941, c. 412, 55 Stat. 687; Joint Resolution of July 23, 1943, c. 521, 56 Stat. 703; and Sec. 302, Revenue Act of 1943, c. 63, 58 Stat. 21). TAX.

There shall be levied assessed, collected, and paid—

(a) **Single or Season Ticket; Subscription.**—

(1) **Rate.**—A tax of 1 cent for each 5 cents or major fraction thereof of the amount paid for admission to any place, including admission by season ticket or subscription. In the case of persons (except bona fide employes,

municipal officers on official business, children under twelve years of age, members of the military or naval forces of the United States when in uniform, members of the military or naval forces of any of the United Nations, when in uniform, and members of the Civilian Conservation Corps when in uniform) admitted free or at reduced rates to any place at any time when and under circumstances under which an admission charge is made to other persons, an equivalent tax shall be collected based on the price so charged to such other persons for the same or similar accommodations, to be paid by the person so admitted. No tax shall be imposed on the amount paid for the admission of a child under twelve years of age if the amount paid is less than 10 cents. Amounts paid on and after October 1, 1941, for admission to theatres and other activities operated by or under the control of the War Department or the Navy Department within posts, camps, reservations, and other areas maintained by the Military or Naval Establishment shall be exempt from

the tax imposed by this section: **Provided,** That the net proceeds from said admission charges are used exclusively for the welfare of the military or naval forces of the United States.

(2) **By whom paid.**—The tax imposed under paragraph (1) shall be paid by the person paying for such admission.

* * * * * *

(26 U.S.C. 1946 ed., Sec. 17.)

Treasury Regulations 43 (1941 ed.), promulgated under the Internal Revenue Code:

Sec. 101.2 **Meaning of "Admission."**—The tax is imposed on "the amount paid for **admission** to any place," and applies to the amount which **must be paid** in order to gain admission to a place. (See section 101.4.) The term "admission" means the right or privilege to enter into a place. The law specifically provides that it shall also include "seats and tables, reserved or otherwise and other similar accommodations." A charge for their use in any place must, therefore, be treated as a taxable charge for admission. So an amount paid for the right to use a reserved seat in a theater or circus, a seat in a room or win-

dow to view a parade, or the like, is taxable. This is true whether the charge made for the use of the seat, table, or similar accommodation is combined with an admission charge proper to form a single charge, or in separate and distinct from an admission charge, or is itself the sole charge. The tax under section 1700 (a) as amended does not apply, however, to admissions to or charges for seats and tables in a cabaret, roof garden, or similar place which are subject to the provisions of section 1700 (e) of the Code as amended. (See sections 101.13 and 101.14.)

Where an original admission charge carries the right to remain in a place, or to use a seat or table, or other similar accommodation, for a limited time only, and an additional charge is made for an extension of such time, the extra charge is paid for "admission" within the meaning of the Code.

The amount paid for admission by season ticket is a fixed sum which entitles the holder to admission on definite dates to a series of scheduled attractions, or to admission at all times during the season, and the form of the ticket is not controlling.

A subscription ticket is one which is issued to a person who subscribes a sum of money to the expense of an entertainment or who agrees to bear a portion of the expense thereof when the amount is ascertained.

An amount paid to become regularly entitled to the privileges of a club or other organization, as member or otherwise, is not an "amount paid for admission" even though one of the privileges be the right to enter a clubhouse, club grounds, gymnasium, swimming pool, or the like. But where the chief or sole privilege of a so-called membership is a right of admission to certain particular performances or to some place on a definite number of occasions (as contrasted with a more or less unlimited right to enter a clubhouse or other place as many times as desired during a year or some other period), then the amount paid for such so-called membership is an "amount paid for admission" within the meaning of the Code. An entirely different tax is levied on amounts paid as initiation fees or as dues or membership fees to certain classes of clubs or organizations, and also upon life

members of such clubs, by section 1710 of the Code. (See Subpart F.)

Where a person or organization acquires the sole right to use any place or the right to dispose of all the admissions to any place for one or more occasions, the amount paid for such right is not subject to the tax on admissions. Such a transaction constitutes a rental of the entire place and of the attraction, if any, whether or not it is so designated. However, if the person or organization in turn sells admissions to the place the tax will apply to amounts paid for such admissions.

If a charge imposed on a person admitted to a place is designated as an admission it will be presumed that it is in fact an admission charge, even though it includes rental of property or services, such, for example, as a charge of 50 cents for admission to a swimming pool, including use of a suit. The tax will apply in such case unless it is clearly shown that the charge is for rental or services, and that persons who do not use the property or services offered (e.g., use of a swimming suit) are admitted free. On the

other hand, the designation of a charge as a rental or service charge (e.g., a charge for use of a swimming suit) will not avoid the application of the tax if it in fact represents a charge for admission, or includes the right to admission. If the same charge is made to the person using or furnishing his own property or equipment, as where property or equipment is furnished by the management, such charge is an amount paid for admission and subject to tax. If a lesser charge is made to persons who do not desire to use the property or services offered, the lesser charge represents the admission charge.

Sec. 101.3 **Meaning of the Term "Place."** —The tax under section 1700 (a) of the Code is on the amount paid for admission **to any place.** "Place" is a word of very broad meaning, and it is not defined or otherwise limited by the Code. But the basic idea it conveys is that of a definite inclosure or location. The phrase "to any place," therefore, does not narrow the meaning of the word "admission," except to the extent that it implies that the admission is to a definite inclosure or location.

The inclosure or location may be on above, or beneath the surface of the earth. Places of amusement obviously constitute the most important class of places admission to which is subject to this tax.

Sec. 101.42 **Abatement or Refund of Erroneous or Illegal Assessments or Collections.** —A claim for abatement or refund of taxes alleged to have been erroneously or illegally assessed or paid (or of any penalties assessed or collected without authority) must be filed by the person against whom they were assessed, or by whom they were in the first instance erroneously or illegally paid. The claim should be prepared on Form 843 and presented to the collector of internal revenue for the district in which the amount claimed was assessed or paid. (See section 3313 of the Code.)

In any case where a club as agent of its members seeks a refund of tax collected by the club and paid over by it to the collector of internal revenue, since the members and not the club are the actual taxpayers, the claim must be accompanied by the following:

(a) An alphabetical list of the names the taxpayers, showing the amount claimed refund in behalf of each, and the dates which the amounts were paid to the collect of internal revenue.

(b) A power of attorney executed by ea person in whose behalf the claim is filed aut orizing the organization to act as his agen The power of attorney must be prepared i the usual form of such instruments; must l acknowledged before a notary public or signe in the presence of two witnesses, and mus include a statement that any revocation ther of will not be effective until the Commissione receives notification.

(c) A copy of the constitution and by-law or other rules and regulations of the organiza tion, together with a copy of each amendmen thereto.

If a member files a refund claim himse there must be attached to the claim a stat ment of a responsible officer of the organiza tion showing the date or dates when the an ounts claimed were paid to the organizatio and the date or dates when the organizatio

paid over such amounts to the collector.

If an amount claimed was collected by direct assessment against an individual member, the claim must be made in the name of the member and must set forth the date and place of payment and additional data sufficient to enable the Commissioner to pass upon its merits.

In the case of a deceased member, evidence of the authority to file the refund claim in his behalf must be submitted.

(a) An alphabetical list of the names of the taxpayers, showing the amount claimed in refund in behalf of each, and the dates on which the amounts were paid to the collector of internal revenue.

(b) A power of attorney executed by each person in whose behalf the claim is filed authorizing the organization to act as his agent. The power of attorney must be prepared in the usual form of such instruments; must be acknowledged before a notary public or signed in the presence of two witnesses, and must include a statement that any revocation thereof will not be effective until the Commissioner receives notification.

(c) A copy of the constitution and by-laws or other rules and regulations of the organization, together with a copy of each amendment thereto.

If a member files a refund claim himself there must be attached to the claim a statement of a responsible officer of the organization showing the date or dates when the amounts claimed were paid to the organization and the date or dates when the organization

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